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17 **IN THE UNITED STATES DISTRICT COURT**  
 18 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

SURF AND SAND, LLC, a California Limited Liability Company,	Plaintiff,	CASE NO. C07 05043
		Judge: Richard Seeborg
CITY OF CAPITOLA, and DOES 1 through 10, Inclusive	Defendants.	<b>E-FILING</b>
		Date: May 21, 2008 Time: 9:30 a.m. Ctrm: 3, 5 <sup>th</sup> Floor
		ACTION FILED: 10/01/07

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22 **DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION**  
 23 **TO MOTION TO DISMISS FIRST AMENDED COMPLAINT**

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## INTRODUCTION

Defendant’s (“Parkowner”) Opposition is rife with contradiction. Parkowner appears to insist that it has a bona fide intent to convert its Park to resident ownership. At the same time however, it has informed both the Park residents and defendant (“City”) that it intends to close the park instead.

6 Moreover, in the midst of a deepening real estate recession, Parkowner complains  
7 that its residents do not want to buy their spaces. Parkowner calls this a resident “veto”;  
8 however, given that the residents are the only likely potential buyers, Parkowner  
9 essentially is claiming that the “market” will veto its subdivision. Certainly a professed  
10 intent to convert the Park, during a recession, and with no willing buyers, does not appear  
11 bona fide.

12 Parkowner's facial private and public takings claim fail for the simple reason there  
13 was no taking caused by the mere enactment of the PCONO. Indeed, the PCONO's  
14 economic impact on Parkowner, if any, is unknowable until Parkowner goes through the  
15 conversion process.

16 Parkowner's private taking and substantive due process claims fail because City  
17 rationally could have believed that if most Park residents were unwilling to buy their  
18 spaces, any Park conversion might be unsuccessful.

19 Parkowner's equal protection claim fails because on its face the ordinance does not  
20 treat similarly situated mobilehome parkowners differently.

## ARGUMENT

I

## PARKOWNER FAILS TO STATE ANY TAKINGS CLAIM - PUBLIC OR PRIVATE

25 The *sine qua non* of any facial taking claim is economic impact. Here Parkowner  
26 must show that the mere enactment of the PCONO caused such “severe” diminution in

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1 value of its park that it is "commercially impracticable for [it] to continue operating [its  
 2 park]." *Garnau v. City of Seattle*, 147 F.3d 802, 807-08 (9<sup>th</sup> Cir. 1998). Parkowner makes  
 3 no such allegation. Nor has it applied for a rent increase under the RCO on the grounds it  
 4 is not receiving a fair return on its Park.

5 Moreover, the Court can see that on its face, the PCONO has no economic impact  
 6 on Parkowner until such time as Parkowner attempts to convert its Park.

7 **II**

8 **PARKOWNER CANNOT STATE A PRIVATE TAKING  
 9 OR SUBSTANTIVE DUE PROCESS CLAIM BECAUSE  
 THE PCONO IS RATIONALLY RELATED  
 TO A LEGITIMATE GOVERNMENT PURPOSE**

11 Parkowner complains that resident interest in buying its park is irrelevant to the  
 12 issue of a bona fide conversion. Parkowner forgets that it was the State - not the City -  
 13 that initially imposed the requirement of a resident survey (Cal. Gov't Code § 66427.5(d))  
 14 for the very purpose of determining whether a proposed conversion was bona fide.<sup>1</sup> All  
 15 City's Ordinance does is procedurally flesh out how the survey is to be used. Parkowner  
 16 never sued the State to challenge the validity of section 66427.5.(d).

17 Parkowner apparently is so accustomed to having an adversarial relationship with  
 18 its Residents, that it also forgets that these very Residents are its potential customers in  
 19 any conversion. If Parkowner does not have any customers for its conversion, it certainly  
 20 is not City's fault. Moreover, a lack of sufficient customers willing to buy spaces  
 21 certainly is some indication that a conversion might not be successful. Where a  
 22 parkowner purports to sell his park to its residents, knowing they will not buy it and that  
 23 he cannot successfully convert it, a reasonable inference is that he has some intent other

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25 <sup>1</sup>Given the State intended the survey to help determine whether a proposed conversion  
 26 was bona fide, it is difficult to understand what information it expected to collect other  
 than the park residents' interest in and financial ability to buy the spaces in their Park.

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1 than going through the conversion process.

III

# PARKOWNER FAILS TO STATE AN EQUAL PROTECTION CLAIM BECAUSE THE PCONO IS FACIALLY NEUTRAL

6 On its face the PCONO does not purport to treat similarly situated property owners  
7 differently. Under the circumstances Parkowner's equal protection claim does not  
8 challenge the PCONO itself.

9 Parkowner instead claims that City did not enact the PCONO in response to earlier  
10 conversion of a resident-owned park, but only passed it in response to Parkowner's  
11 expressed intent to convert its park. Parkowner's argument, however, misses the point.

12       First, any time a City enacts a new land use restriction, affected property owners  
13 will be able to claim that similarly situated pre-restriction property owners did not face  
14 the same restriction. If such a claim evidences an equal protection violation, no  
15 governmental entity could promulgate new land use regulations.

16 Second, Parkowner fails to negate any rational reason why the PCONO was not  
17 adopted earlier. As City noted in its motion, the previous subdivision was of a park that  
18 was owned by a resident-owned corporation. As a resident-owned park, it was exempt  
19 from rent control and the City certainly had a rational basis for therefore concluding that  
20 it was not a sham conversion to avoid rent control.

21 Parkowner's proposed conversion was the first private conversion proposed after  
22 the amendment of Government Code Section 66427.5. Because Section 66427.5 was  
23 silent as to the survey's contents, or any procedures for its use, the City needed to adopt a  
24 local ordinance to fill these gaps.

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## CONCLUSION

For the foregoing reasons, the Court should dismiss Parkowner's First Amended Complaint.

Respectfully Submitted,

Dated: April 28, 2008

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